SUPREME COURT, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 70-29

MAY-DAYTON, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

# BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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# In the Supreme Court of the United States

OCTOBER TERM, 1970

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No. 394

MINK-DAYTON, INC., PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 13-15) is not yet officially reported. Its earlier opinion (Pet. App. 15-37) is reported at 416 F. 2d 327. The Board's supplemental decision and order (App. *infra* pp. 13-16) are reported at 181 NLRB No. 40. Its earlier decision and order are reported at 166 NLRB 604.

## JURISDICTION

The judgment of the court of appeals was entered on April 20, 1970. The petition for a writ of certiorari was filed on July 15, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether, in the circumstances of this case, the National Labor Relations Board properly ordered the employer to recognize and bargain with the union as a remedy for its violations of Section 8(a)(1) and (5) of the National Labor Relations Act.

## STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at p. 2 of the petition. Also relevant are Sections 7 and 8(a)(1) of the Act, which provide:

> Sec. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities * * *.
>
> Sec. 8(a). It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by section 7; * * *

## STATEMENT

Mink-Dayton, Inc., is engaged in the design and fabrication of metal products. Its Dayton, Ohio, plant was the site of organizational campaigns by various labor organizations between 1961 and 1966. The Sheet Metal Workers[1] ("the Union") began organizing activities at the plant in the autumn of 1964, and requested recognition as the employees' bargaining representative early in 1965. The Company refused, and on February 5, 1965, the Board conducted an election, which the Union lost by a vote of 33 to 27. (A. 3-4, 522-523).[2] The results of that election were certified on June 3, 1965, following the investigation and disposition of election objections filed by the Union (A. 4).

In January 1966, the Union renewed its organizing efforts among the Company's employees. By February 7, the Union had obtained signed authorization cards from 44 of the Company's 89 production and maintenance employees (A. 21-25, 481-483).[3] On

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[1] Sheet Metal Workers International Association, Local 224, AFL-CIO.

[2] "A." references are to the Appendix to the briefs filed in the court below.

[3] The card read as follows:

SHEET METAL WORKERS'
INTERNATIONAL ASSOCIATION
Affiliated with AFL-CIO
AUTHORIZATION FOR REPRESENTATION

I, the undersigned, hereby authorize the SHEET METAL WORKERS INTERNATIONAL ASSOCIATION or any affiliated Local Union thereof, to repre-

that day, the Union sent a telegram to the Company requesting recognition as the employees' collective bargaining representative (A. 5, 61, 454). The Company responded the same day and refused to recognize the Union, stating that it doubted that the Union represented a majority (A. 5, 61, 455). One week later, the Union filed a petition for an election with the Board, supported by 48 signed authorization cards (A. 5, 21-25, 77, 481-484).

On March 15, 1966, prior to the commencement of the hearing on the election petition, Union agent Rodgers told the Company's president that the Union desired to negotiate. The Company made no immediate response to this request, but Company counsel made it clear during the course of the hearing that the Company still was unwilling to recognize the Union (A. 19, 117). As of that date, the Union possessed authorization cards from 52 of the 89 production and maintenance employees (A. 26). Following the hearing, an election was scheduled for May 13, 1966 (A. 5-6).

During the two-month period between the representation hearing and the election the Company

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sent me for purposes of Collective Bargaining, and in my behalf, to negotiate and conclude all agreements as to hours of labor, wages, and other conditions of employment.

Name ..... Tel. No. .....
Address ..... City .....
Employed by ..... Shift .....
Classification ..... Wage Rate .....
Date ..... (Signed) .....
(Name)

launched an anti-union campaign aimed at all the employees. Company President Materese wrote a letter to the employees on March 23, stating that the Company had been making "great progress" in discussions of a pension plan with the employees' shop committee, but that "because of present union activities and legal restrictions imposed because of them, further work and discussion [concerning pensions] have been dropped" (A. 27, 62, 456-457). In a letter sent to all the employees on May 11, two days before the election, Materese juxtaposed explanations of what the Company had done for the employees and predictions of economic and other disadvantages should the employees choose the Union as their representative. Thus, the letter reiterated that "union activities forced us to drop all discussions" concerning "a fine pension plan," and warned that "[w]ith the Union, merit increases would go out the window" and that selection of the Union would result in rigid job classification and a general tightening of working conditions (A. 463, 464). The letter further stated that "[s]hould the Union get in, you may also be threatened periodically with crippling strikes—long periods during which you'll get no pay at all, when customers may go elsewhere * * *" (A. 464).

On May 12, 26 hours before the election, President Materese delivered a speech to the employees in which he again noted that the Company had to "give * * * up [the pension plan] until this thing blows over." He also told the employees that "in a union shop there are no job transfers"; that when the employees complete their assigned work they "got to go home"; and

that under a union contract "[y]ou're not going to have the liberties that you have now." Materese further stated that, when the Union's negotiators dealt with the Company, they would "find out how much they can squeeze out of the stone, and they'll get as much as they can squeeze and no more." Finally, Materese warned that "with the Union * * *, you can't talk with the boss anymore, you can't go upstairs and borrow 25 bucks without interest" (A. 471, 472-473, 474-475, 476-477).

During the two-month period between the representation hearing and the election, Foreman Wesley Bryant had frequent, sometimes lengthy, conversations with employee Brown Gwin concerning the Union (A. 14, 230-231). Bryant told Gwin that "if a union came in the place he would have to get rid of all the younger employees * * *" (A. 231.)[4] He also said that if the Union came in the employees would be sent home when they ran out of work, instead of being allowed to take temporary assignments to other jobs as under the existing plant operating policy (A. 14, 46, 231, 413-414). In addition, Bryant told Gwin that, if the Union won the election and the Company was forced to pay higher wages, it could lead to a loss of business, with a concomitant loss of jobs (A. 14, 420-421).

On May 13, the Union lost the election, 38 to 39 (A. 6). The Union filed timely objections to the election, which were consolidated for hearing with the

[4] At the time of these remarks, Gwin had been employed by the Company for less than eight months, and was thus one of the Company's "younger employees." (A. 226, 231).

present unfair labor practice case, also initiated by the Union (A. 2).

The Board found that the Company's letters of March 23 and May 11, Materese's speech of May 12, and the statements by Foreman Bryant to employee Gwin were coercive, and that the Company thus violated Section 8(a)(1) of the Act (A. 13, 14-15). The Board also found that the Union had obtained valid authorization cards from a majority of the employees when Union agent Rodgers made his request for recognition on March 15, 1966, and that the Company's refusal to bargain was designed to gain time within which to undermine the Union's majority status (A. 26-27). Accordingly, the Board concluded that the Company's refusal to bargain violated Section 8(a)(5) of the Act, and ordered the Company to bargain with the Union (A. 26-27, 29-30).

The court of appeals agreed that the Company had engaged in the Section 8(a)(1) violations found by the Board, and that the Union possessed valid authorization cards from a majority of the employees when the Company refused its March 15, 1966, request for recognition (Pet. App. 18-19). The court, however, remanded the Section 8(a)(5) portion of the Board's order—which imposed the bargaining requirement—for further consideration in light of this Court's intervening decision in *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575. Thereafter, the Board issued its supplemental decision, reaffirming the bargaining order. The Board

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[5] The Board also found that the Company's conduct interferred with the employees' free choice in the May 13, 1966, election and, accordingly, set the election aside (A. 27-28).

concluded, after reconsidering the record in light of *Gissel*, that the Company's unfair labor practices "were sufficiently serious and extensive as to make it unlikely that the lingering effects of the [Company's] unlawful conduct could be neutralized by resort to conventional remedies," and that a bargaining order was thus needed to protect the rights of the employees. (App., p. 15, *infra*.) Subsequently, the court of appeals, relying on the principles set forth in *Gissel*, granted the Board's motion to enforce the bargaining order (Pet. App. 13-15).

## ARGUMENT

The decision of the court of appeals enforcing the Board's supplemental decision and order comports fully with the principles enunciated in *Gissel*, *supra*, and further review is unwarranted.

The Company does not challenge the ruling below that it engaged in serious unfair labor practices and that under *Gissel* a bargaining order is an appropriate remedy for those practices. It contends, however, that the authorization cards signed by a majority of the employees and designating the Union as their bargaining representative were invalid since they were "solicited on the representation that they were to be used solely for the purpose of an election * * *" (Pet. 8).

The record does not support this assertion and the validity of the cards cannot be seriously challenged.

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On June 22, 1970, Mr. Justice Stewart denied the Company's application for a stay of the court of appeals' judgment pending the filing and final disposition of a petition for a writ of certiorari.

As *Gissel* points out, there is no inconsistency "in handing an employee a card that says the signer authorizes the union to represent him and then telling him that the card will probably be used first to get an election"; "employees should be bound by the clear language of what they sign unless that language is deliberately and clearly cancelled by a union adherent with words calculated to disregard and forget the language above his signature." *Gissel*, *supra*, 395 U.S. at 606-607. There is no such showing in this case.

The card here clearly and unambiguously authorizes the Union to represent the signer for purposes of collective bargaining (see note 3, *supra* p. 3). Admittedly, the Union's principal solicitors told several employees that the cards would be used to obtain an election. But, as the Board found, each employee who signed a card either read the printed material on the card or was otherwise apprised that the card would authorize the Union to represent him. Nor does the record support any claim that the cards were obtained on representations that either "cancelled" the language of the cards or directed the signers "to disregard and forget the language above his signature" (A. 21-25). The generalized effect on employees of

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The Board's conclusion is amply supported by the record. Early in February 1966, while the authorization cards were being distributed, Union Representative Rodgers held several meetings with the Company's employees, at which he told them that "the purpose of the card was for [him] to assist them in getting representation by [the Union], and that [he] would ask for representation if there was a majority of the people that wanted a union * * * by letter or telegram" (A. 130). Employee Pack, the Union's chief card

statements made concerning different cards in past campaigns (Pet. 2-8, 14-15) is too speculative to be given any weight against the clear wording of the cards signed in this campaign. The court of appeals held that the record contains "substantial evidence to support" these findings (Pet. App. 19). The Company's challenge to the validity of the cards thus presents only an evidentiary issue, which does not warrant further review.

The Company also argues that the issuance of the bargaining order violates Section 9(c)(3) of the Act (Pet. 9-12). That section prohibits direction of an election in any bargaining unit "within which in the preceding twelve-month period, a valid election shall have been held." The question whether Section 9(c)(3) should be construed to apply to requests for rec-

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solicitor, told employees Kanak and Collier that the purpose of the card was for an election (A. 157), but Kanak was already working for the Union and had told Pack that he "believed in it" (A. 162-163), and Collier had told Pack that he felt there was a need for the Union and that he wanted it to represent him (A. 163-164). Pack testified that *if* he told any other employee what the purpose of the card was, he mentioned only that it was for an election (A. 158). None of the employees Pack solicited, however, gave testimony indicating any misunderstanding as to the stated purpose of the cards (A. 158, 222, 259, 337-338, 352, 354). Employee Newsome, who assisted Pack in distributing cards, also mentioned an election to several of the employees he solicited, but there is no evidence to indicate that any of these men were led to believe that the only purpose in signing was to have an election (A. 76, 191-192, 203, 213, 269, 322-323, 340). The election purpose statements involved herein were thus plainly milder than those found unobjectionable in *General Steel* (one of the cases consolidated with *Gissel*), 395 U.S. at 584-585, n. 5.

ognition and bargaining orders based thereon, see *Conren, Inc.* v. *National Labor Relations Board*, 368 F. 2d 173 (C.A. 7), certiorari denied, 386 U.S. 974, is not present in this case. The previous election took place February 5, 1965, and the request for recognition which forms the basis for the Board's decision was made March 15, 1966, more than 13 months later. (A. 19-20, 26).

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The election results were not certified until June 3, 1965 (Pet. 10). However, the Board has uniformly held that the 12-month limitation period imposed by Section 9(c)(3) begins to run from the date of the balloting, and not from the date of final determination of the results. See *Palmer Mfg. Co.*, 103 NLRB 336, 337; *Mallinckrodt Chemical Works*, 84 NLRB 291. The Board does refuse to entertain election petitions for a period of one year following the date of certification where a union wins an election (see Pet. 11-12). Contrary to the Company's suggestion (Pet. 11-12), there is no inconsistency between the two policies, for they rest on different considerations. Section 9(c)(3) was designed to ban the holding of *elections* more often than once a year and thereby avoid disrupting an employer's plant with too frequent Board elections. *Fruitvale Canning Co.*, 85 NLRB 684, 686; see 2 Leg. Hist. of the Labor Management Relations Act, 1947 (G.P.O. 1948) 1013, 1639; 93 Cong. Rec. 3838, 7529. The Board's certification policy under Section 8(b)(7)(B) rests upon the principle that a bargaining relationship, once established, must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed. *Brooks* v. *National Labor Relations Board*, 348 U.S. 96; *Centr-O-Cast & Engineering Co.*, 100 NLRB 1507, 1508.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1970.

## APPENDIX

## UNITED STATES OF AMERICA
## BEFORE THE
## NATIONAL LABOR RELATIONS BOARD

Cases 9-CA-3950 9-RC-6701

MINK-DAYTON, INC.

and

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 224, AFL-CIO

## SUPPLEMENTAL DECISION

On June 30, 1967, the National Labor Relations Board issued its Decision and Order[1] in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended, and ordering that the Respondent cease and desist therefrom and take certain affirmative action.

On September 17, 1969, the United States Court of Appeals for the Sixth Circuit affirmed the Board's findings that the Respondent had engaged in conduct violative of Section 8(a)(1) of the Act,[2] but remanded the case to the Board for further findings with respect to the violations of Section 8(a)(5), consistent with the guidelines established by the U.S. Supreme Court's decision on June 16, 1969, in the *Gissel* case.[3] In *Gissel*, the Supreme Court affirmed

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[1] 166 NLRB No. 79.

[2] *N.L.R.B.* v. *Mink-Dayton, Inc.*, 416 F. 2d 327.

[3] *N.L.R.B.* v. *Gissel Packing Company*, 395 U.S. 575.

the Board's use of authorization cards as a basis for establishing a union's majority status and issuing a bargaining order under certain conditions.

On October 2, 1969, the Board issued a Notice granting all parties the opportunity to file statements of position with respect to the matters raised by the Court's remand. Such statements were filed by the Respondent, the Union, and the General Counsel.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has considered the statements of position and the entire record in this proceeding in the light of *Gissel*, *supra*, and, for reasons set forth below, affirms its original conclusion that the Respondent violated Section 8(a)(5) of the Act by refusing to recognize and bargain with the Union as the majority representative of the employees, and that a bargaining order is necessary to effectuate the purposes of the Act in this case.[4]

In its Decision and Order of June 30, 1967, the Board found that the Respondent had violated Section 8(a)(1) of the Act by letters and a speech to all the employees, threatening them with economic loss if they selected the Union as their bargaining representative. The threats were made by the Respondent's president and by a supervisor. The Board also found that the Union had valid authorization cards from a majority of the employees in an appropriate bargaining unit at the time of its demand for recognition in March 1966, and, therefore, was

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[4] The Union's request for oral argument is denied. The Union's position on the remand issues has already been adequately presented.

entitled to represent the employees for collective-bargaining purposes. The Court approved all these findings.

We have reexamined the entire record, including the statements of position, and are convinced that the refusal-to-bargain finding and the bargaining order are justified in this case within the meaning of *Gissel*. The Respondent's campaign to defeat the Union's organizational efforts consisted of various acts of interference, restraint, and coercion involving all the employees in the unit. These acts not only interfered with the election held on May 13, 1966, but also were sufficiently serious and extensive as to make it unlikely that the lingering effects of the Respondent's unlawful conduct could be neutralized by resort to conventional remedies which would produce a fair rerun election. Moreover, we believe in the circumstances that restoration of the *status quo ante* is required in order to vindicate employee rights and prevent the Respondent from profiting from its own unfair labor practices. We therefore conclude, on balance, that the employee sentiment as expressed through the authorization cards is a more reliable measure of the employees' desires on the issue of bargaining representation than a future rerun election. Accordingly, we find that by refusing to recognize and bargain with the Union and by engaging in the aforesaid unfair labor practices, the Respondent violated Section 8 (a) (5) and (1) of the Act and that the policies of the Act will best be effectuated by imposition of a bargaining order to remedy such violations.

Under these circumstances, we reaffirm the Section 8(a)(5) finding made and the bargaining order issued in the original Decision and Order.

Dated, Washington, D.C. February 20, 1970.

Frank W. McCulloch, Chairman

Gerald A. Brown, Member

Howard Jenkins, Jr., Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)